In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 952

JULES GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–11a) is reported at 242 F. 2d 122.

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1957 (Pet. 12a), and a petition for rehearing was denied April 1, 1957. The petition for a writ of certiorari was filed on April 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether there was sufficient competent evidence to support petitioner's conviction for conspiring to

attempt to evade and defeat the income taxes of another.

2. Whether the trial court committed prejudicial error in permitting an expert witness to compute the income tax liability of a taxpayer upon the basis of records he had personally examined.

3. Whether the trial court's instruction to the jury adequately defined the offense alleged in the indictment.

STATUTES INVOLVED

18 U. S. C.:

> SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
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> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truth-

fully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

STATEMENT

On July 14, 1955, petitioner was indicted with Norman Tanz, an Internal Revenue agent, in the United States District Court for the Eastern District of Pennsylvania for conspiring to commit an offense against the United States, *i. e.*, willfully attempting to evade and defeat a large part of the income taxes of Alfred W. McClure for the year 1948. (R. 1a–4a.)[1] Clifford Harper, accountant for McClure, was named as a co-conspirator but not a co-defendant. After a jury trial, Tanz was acquitted and petitioner was found guilty as charged. On May 25, 1956, he was sentenced to imprisonment for one year and fined $1,000. (R. 324a, 326a.)

The evidence to support the verdict may briefly be summarized as follows:

McClure was an automobile dealer whose income tax returns for 1947 and 1948 had been prepared by Harper. (R. 15a, 47a, 163a.) Upon the basis of his net profit, as stated in a financial report prepared for

[1] The record consists of the appendices filed in the court below, that of appellant being paginated "1a–326a", and that of appellee, "1b–26b."

the Ford Motor Company, McClure's income taxes for the year 1948 should have been $5,449.08.[2] (R. 249a–252a.) This report was used by Harper when he prepared the 1948 return (R. 164a–169a); yet the return reported taxes of only $1,315.70. (R. 219a–220a.) In April 1950, Revenue Agent Tanz began an audit of the return, and he ultimately submitted a report assessing McClure's taxes for 1948 at only $1,808.50.[3] (R. 219a–220a, 251a–252a.) Tanz also used the Ford Motor Company report during the course of his audit (R. 122a, 1b–6b), but the amount of tax he assessed for 1948 was almost $4,000 less than it should have been on the basis of that report (R. 249a–251a).

Shortly after Tanz began his audit, he told McClure that he was in trouble and would probably have to pay about $17,000 additional taxes for 1947 and 1948 (R. 21a, 34a); but after a series of conferences between Tanz and Harper, Tanz finally said he had a friend who could probably effect a quick closing of the case for a tax of about half that amount (R. 142a–151a). McClure was given to understand that he would have to pay about $9,500 additional taxes for the two years involved, and he gave Harper $5,000 to be applied to this liability. (R. 22a–24a, 51a–52a.)

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[2] This financial report was introduced in evidence. Upon the basis of a complete audit of all McClure's books by Revenue Agent Tinsley, however, his income tax for the year 1948 should have been $11,640.76. (R. 249a–252a.)

[3] For the year 1947, McClure reported $3,315.10, whereas his tax should have been $7,472.11 on the basis of the Ford Motor Company statement. Tanz' report assessed the tax at $6,859.65.

Harper met Tanz' "friend", who turned out to be petitioner,[4] and gave him $3,000 in currency. Petitioner accepted the money, but indicated somewhat indignantly that he had expected more. (R. 151a–154a.) Tanz turned in a report to his superiors indicating that McClure owed about $4,500 in additional taxes and interest for 1947 and 1948. (R. 7a.)

Some time later, McClure received a bill from Internal Revenue for the $4,500. (R. 155a, 159a.) Meanwhile, however, he had had his books audited by an accounting firm, Evans and Bennett, and they reported to him that, according to their calculations, his additional taxes for 1947 and 1948 would be only about $4,300 instead of $9,500 as he had been advised by Tanz. (R. 56a–67a.) McClure was warned by the accountants that the transaction with petitioner, Harper and Tanz looked like a shakedown, and he decided that he had paid enough. (R. 69a, 83a, 97a.) A meeting was arranged between McClure, Harper and petitioner. Petitioner cautioned McClure at the outset that he could be prosecuted for filing a false return, said that he was in a hurry to keep another appointment, and urged McClure to make out a check for the $4,500 additional taxes and penalties. McClure, insisting that he had paid enough, refused to make out the check. After considerable discussion, petitioner offered to return some of the money which had been given to him by Harper, if ~~petitioner~~ McClure would make out a check for $4,500 to the Collector of In-

[4] Petitioner used the names "Jones" and "Smith" during his transactions with Harper and McClure. (R. 151a, 157a.)

ternal Revenue. The result was that petitioner returned $2,500 to McClure while Harper returned $1,800, and McClure then made out a check for $4,500 and mailed it to the Collector. (R. 27a–33a, 93a–97a, 158a–159a, 178a–179a.)

Petitioner did not take the stand and offered no evidence in his own behalf.

ARGUMENT

1. Petitioner argues (Pet. 8–11) that there was no competent evidence in the record to establish the falsity of Tanz' report, and that there was, consequently, no sufficient evidence to establish a conspiracy, between himself, Tanz and Harper, to evade and defeat McClure's taxes for 1948. But petitioner fails to mention the statement prepared for the Ford Motor Co., which was in evidence and which formed the basis for the Government's calculation of the taxes actually owed by McClure for 1948. (R. 249a–250a.) Harper used that statement in preparing the original return; Tanz used it in preparing the report of his audit; and Revenue Agent Tinsley also used it in preparing his subsequent report. The return prepared by Harper assessed McClure's tax for 1948 at $1,315.70; Tanz assessed only $1,808.50; but Tinsley assessed a tax of $5,449.08. Petitioner does not dispute the fact that there was overwhelming evidence of *a* conspiracy between himself, Tanz and Harper. We submit that the Ford Motor Co. statement clearly provided a basis for a conclusion by the jury that Tanz submitted a false report to his superiors and that one of the objects of the conspiracy was to enable

McClure to evade a large part of his taxes for 1948. Petitioner relies heavily (Pet. 4–5, 9) on the assertion that the Evans and Bennett audit of McClure's books reached a conclusion substantially the same as that of Tanz. But this was simply an item of evidence for the jury to weigh, and it is significant that all the testimony as to the result of the Evans and Bennett audit came from McClure himself and no member of that firm was called to the stand by the defense.[5] There was substantial competent evidence to support the verdict, and petitioner's argument is without merit.

The inconsistency of the jury action in acquitting Tanz provides, of course, no basis for a reversal as to petitioner. In a similar case in the Second Circuit, a jury had acquitted two revenue agents who had been among those indicted for a conspiracy to violate the National Prohibition Act. The opinion of Judge Learned Hand states (*Uniter States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 233, certiorari denied, 279 U. S. 863):

> * * * How an intelligent jury could have acquitted any of the defendants we cannot conceive.
>
> Unfortunately they did just that in the case of Chamberlain and Jackson, and this inconsistency is one ground of the appeal. If the verdict had left only one defendant who could be guilty, undoubtedly it could not stand. * * *

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[5] Actually the result reached by Evans and Bennett for 1948 appears to have been more nearly in accord with that of Revenue Agent Tinsley than with that of Tanz. (R. 264a–265a.)

> There must be other possible conspirators, not acquitted, for a conspiracy is an agreement. * * * The verdict must not itself deny the existence of the essential facts. But it is not a variance to fail to convict all those indicted, though strictly the agreement laid is then not the agreement proved. * * * Even so, the appellants argue that a scrutiny of the evidence discloses that in the nature of things they could not have been engaged in the venture, unless Jackson and Chamberlain were also in it as their privies.
>
> Upon that assumption there undoubtedly results a rational inconsistency between the verdicts; the conviction finds that the appellants have done what they could not have done alone; the acquittal, that their inevitable accomplices did not share in it with them. * * * We need only consider whether there is any indication that the jury was improperly moved to convict, and upon that question the acquittal throws no light whatever. There is not the slightest reason to assume that they convicted the appellants as part of a bargain to acquit the agents; this may have been the case, but it does not appear. So we have nothing to do with the rational enmeshing of the two findings; each was made separately, each need only bear its own defects. The problem is precisely similar to that when the verdicts upon two counts are logically inconsistent. * * *

In the present case, despite the acquittal of Tanz, there remained two conspirators, Harper and petitioner.

2. In addition to computing McClure's tax liability for 1948 upon the basis of the Ford Motor Co. statement (which was in evidence), Revenue Agent Tinsley also testified that he had made a thorough analysis of McClure's books, and upon the basis of that analysis he computed the 1948 tax at $11,640.76. (R. 217a–219a, 221a, 251a.) Since these books and records were not introduced in evidence at the trial, petitioner argues (Pet. 2, 7, 9–10) that this second computation should not have been admitted.

Petitioner is in no position to complain of the trial court's ruling, although it may not have been strictly in accord with the best-evidence rule. If Tinsley's analysis of McClure's books had been susceptible to attack, the books would certainly have been introduced by the defense and a member of the Evans and Bennett firm would have been called to the stand in refutation of Tinsley. Instead, although the Government offered to produce the books in response to the defense objection, defense counsel ignored the offer, stating that he had taken "strictly a legal position". (R. 258a.) Since the Ford Motor Co. statement, as pointed out above, provided ample evidence of the falsity of the Tanz report, and since there is nothing to indicate that Tinsley's summary of the books was in any way inaccurate, this portion of the argument states no ground for further review by this Court.

3. Finally, petitioner contends that the trial court's instruction to the jury failed to define the substantive offense which he was charged with conspiring to commit. He does not contend that the definition omitted

any of the elements of the attempt to evade taxes made criminal by Section 145 (b), or that it was inaccurate in any manner, but complains that it consisted of only a brief reading from the indictment. (Pet. 11.)[6] As this Court noted in *United States* v. *Bayer*, 331 U. S. 532, 536, the brevity of an instruction does not make it erroneous.

Moreover, at the trial, petitioner's counsel advised the court that he had "no special requests for charge" (R. 311a), and, as petitioner concedes (Pet. 11), he did not object to the instruction given. Having remained silent, he cannot complain on appeal that the instruction, though accurate, was not as elaborate as he desired. Federal Rules of Criminal Procedure, Rule 30; *Humes* v. *United States*, 170 U. S. 210, 211–212; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 575; *Isaacs* v. *United States*, 159 U. S. 487, 490–491. In the cases relied on by petitioner (Pet. 11),[7] substantial errors or omissions were made in the instructions. The Court of Appeals, noting that a re-

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[6] The trial court, reading the indictment, instructed the jury that the offense which the defendants were charged with conspiring to commit was to "* * * wilfully attempt to evade and defeat a large part of the income taxes due and owing to the United States of America by Alfred W. McClure and Doris K. McClure for the year 1948, in violation of 26 USC Section 145 (b) * * *". (R. 314a.)

[7] *United States* v. *Lang*, 239 F. 2d 676 (C. A. 3d); *United States* v. *Cumberland*, 200 F. 2d 609 (C. A. 3d); *United States* v. *Petrie*, 184 F. 2d 417 (C. A. 3d); *United States* v. *Pincourt*, 159 F. 2d 917 (C. A. 3d); *United States* v. *Max*, 156 F. 2d 13 (C. A. 3d); *United States* v. *Noble*, 155 F. 2d 315 (C. A. 3d); *United States* v. *Levy*, 153 F. 2d 995 (C. A. 3d).

versal would be justified, though the point was not preserved, if the instruction prejudiced petitioner (Pet. 7a), properly concluded that it adequately outlined the substantive offense (Pet. 8a).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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